OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

February 19, 1999

Mr. Ryan Tredway
Legal and Compliance Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR99-0501

Dear Mr. Tredway:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 122140.

The Texas Department of Insurance (the "department") received a request for "a certified copy of the Commissioner's Directive of 1 April 1991," "a certified copy of the 1 May 1991 Emergency Order," and "any submission by Hartford . . . in compliance or response to the 1 April 1991 Commissioner's Directive." In response to the request, you submit to this office for review the records at issue. You state that the department is making available to the requestor some of the requested information. You contend, however, that the submitted information may be proprietary and excepted from required public disclosure by section 552.110 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Pursuant to section 552.305 of the Government Code, we notified Hartford Fire Insurance Company (the "Hartford") of the request for information and of its opportunity to claim that the information at issue is excepted from disclosure. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). The notification states that if the company does not respond within 14 days of receipt, this office will assume that the company has no privacy or property interest in the requested information. Hartford responded to our notification and asserted that "the data

submitted is a trade secret and should remain confidential and not disclosed without [Hartford's] permission."[1]

Section 552.110 protects the property interests of private persons by excepting from disclosure two categories of information: (1) "[a] trade secret" and (2) "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." This office cannot conclude that information is a trade secret unless the governmental body or company has provided evidence of the factors necessary to establish a trade secret claim. Open Records Decision No. 402 (1983). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939);[2] *see generally* Open Records Decision No. 363 (1983). Based on our review, we conclude that the submitted records are not the type of information considered to be trade secret. Therefore, the requested information is not excepted from disclosure under the trade secret prong of section 552.110.

We next consider whether the information at issue constitutes "commercial or financial information." Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In applying the "commercial or financial information" branch of section 552.110, this office now follows the test for applying the correlative exemption in the Freedom of Information Act, 5 U.S.C. § 552(b)(4). *See* Open Records Decision No. 639 (1996). That test states that commercial or financial information is confidential if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

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[1]We note that information is not confidential under the Open Records Act simply because the party submitting it to a governmental body anticipates or requests that it be kept confidential. Open Records Decision No. 479 (1987).

[2]The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

> (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

It is our understanding that the information at issue was submitted to the department based on the Commissioner's Directive of April 1, 1991, which you have submitted to our office. Therefore, the information was required to be submitted. Thus, we do not believe that you have established the applicability of the impairment prong in this instance. *Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37 (D.D.C. 1997) (no impairment where information was required for bid or contract; contractors "will continue bidding for [agency] contracts despite the risk of revealing business secrets if the price is right"); *McDonnell Douglass Corp. v. National Aeronautics & Space Admin.*, 895 F. Supp. 316; (D.D.C. 1995); *see Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (en banc), *cert. denied*, 507 U.S. 984, 113 S.Ct. 1579 (1992). *See generally* OFFICE OF INFORMATION & PRIVACY, UNITED STATES DEPARTMENT OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW (1997) 149-152, 156-161, n. 142 (discussing "confidential" information under *Critical Mass* and impairment prong under *National Parks*).

"To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted). Neither the department nor Hartford have established that releasing the requested information would likely cause Hartford to suffer substantial competitive injury. Therefore, we conclude that the requested information is not excepted from disclosure pursuant to either prong of section 552.110.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

Sam Haddad

Sam Haddad
Assistant Attorney General
Open Records Division

SH/nc

Ref.: ID# 122140

Enclosures: Submitted records

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